IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 705

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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I

The Brief in Opposition fails to come to grips with the first issue presented in the Petition for Certiorari, where it is demonstrated that the criterion employed by various courts of appeals in determining motions for new trials based on newly-discovered evidence differs from that embraced by this Court.

In its Brief in Opposition, the Government apparently concedes the use of different standards; certainly it does not deny these differences. Instead, it seeks to engraft unwarranted qualifications upon this Court's

decisions in *Mesarosh* v. *United States*, 352 U.S. 1 and *Griffin* v. *United States*, 336 U.S. 704.

A. *Mesarosh*, according to the Government, "mainly has significance where it is claimed that an important Government witness perjured himself at the trial." (Br. in Opp., p. 17). It should be noted that the Government qualifies this assertion with the word "mainly." Nevertheless, the argument in the Brief in Opposition is much too glib. This Court acknowledged that *Mesarosh* was not a typical case in which a defendant sought to show that a Government witness had made, subsequent to the trial, untruthful statements affecting his credibility at the trial. Such a contention, this Court observed, cannot "ordinarily" "support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not * * * an adequate basis for the grant of a new trial." 352 U.S. at 9.

In this case, as in *Mesarosh*, however, "we have an entirely different situation." 352 U.S. at 10. Since no claim has been made in this motion that a Government witness has made untruthful statements which would affect his credibility at the trial, the new evidence which has been proffered is not "merely cumulative or impeaching", but is "new" in every sense of the word.

There is a further reason why *Mesarosh* sets the pattern for the instant case. A critical issue in *Mesa-*

Judge Nordbye held that Schwimmer's testimony "is not merely cumulative, although in many respects it only tends to corroborate the evidence that the defendants had offered heretofore in their behalf at the trial". App. 80. To the extent that Schwimmer's testimony corroborates the testimony of petitioner at the trial, such evidence is a sound ground for granting a motion for a new trial. See Petition for Certiorari, p. 20, particularly n. 15.

rosh was whether the district judge was the proper agency to determine that there was sufficient evidence at the trial, other than certain perjured testimony, to sustain a conviction. In ordering a new trial, this Court pointed out that the perjured testimony "has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." 352 U.S. at 14. A similar pollution has occurred in this case. The most incriminating portion of the prosecution's case rested upon the words, acts, and documents of Harry Schwimmer, which came into evidence without any explanation and permitted implications, inferences and innuendoes which no one could dispel. Particularly damaging was Exhibit 100-J. This cryptic and unexplained entry by Schwimmer enabled the jury to infer that there was a connection between Sachs' money and petitioner.

With the testimony of Schwimmer—now available for the first time—this crucial evidence is cast in an entirely different light. This testimony negates the inferences upon which petitioner's conviction was based, and completely dispels the damaging implications which the prosecution was able to draw before the jury from what the trial judge called "a very poisonous piece of evidence" (Tr. 2885) at the original trial. Certainly, this is not the ordinary case, which this Court distinguished in *Mesarosh*, of a motion for a new trial predicated on untruthful statements which affect a Government witness' credibility. Clearly, it is the kind of case which falls within the ambit of *Mesarosh*, and requires that the "reservoir" be "cleansed."

B. The Government seeks to attenuate the holding in *Griffin* by equally specious reasoning. "It is quite

evident", the Brief in Opposition contends, "that the court was disposing of the capital case before it, but was not attempting to lay down an unbending rule that should govern all cases of all types." (Br. in Opp., p. 18). But the Government does not, and indeed cannot, point to one single line of the *Griffin* decision to support this narrow reading. It is of course true that *Griffin* was a capital case. Yet it is also true that Rule 33, F.R. Crim. P., does not impose a different standard for capital cases than it does for non-capital cases.

What is significant about the *Griffin* case is that it did not involve perjured testimony or the recantation by a Government witness.[2] Like the instant case, it did involve the presentation, for the first time and subsequent to the trial, of important evidence which had not been available at the trial. And in the *Griffin* decision, this Court evinced the same concern for the role of the jury in criminal cases as it did in *Mesarosh* when it reminded the lower court that it would have to consider further whether "it would not be too dogmatic

[2] With regard to a witness recanting his prior testimony, this Court, in *Mesarosh*, cited *Flaxa v. United States*, 130 F. Supp. 413 (S.D.N.Y. 1955), *reargument denied*, 131 F. Supp. 742. In that case, the defense moved for a new trial on the basis of an affidavit in which a witness recanted, after the trial, testimony given in behalf of the Government at the trial. The Government charged that the recantation, rather than the testimony it contradicted, was the lie. The court held that the evidence, then available for the first time, showed that the witness lied either when he testified or when he recanted. Thus, since there was internal evidence of perjury which was related to the "strongest single item of evidence" against one of the defendants, and the witness' testimony "was almost the only persuasive evidence" of another defendant's "personal intent", a new trial must be granted to these two defendants because, "the jury *might* have reached a different conclusion" were it not for the witness' testimony. (Emphasis the court's.) 130 F. Supp. at 420-421.

on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." *Griffin* v. *United States*, 336 U.S. at 709; *cf.*, *Mesarosh* v. *United States*, 352 U.S. at 10-12.

C. The argument contained in the Government's Brief in Opposition with regard to the criterion applicable to motions for a new trial based on newly discovered evidence is significant more for what it does not say than for what it does. Nowhere does it affirmatively seek to support the standard applied by the courts below, which—as we have poined out in our Petition (pp. 11-12)—is the fifth verity of *Johnson* v. *United States* (C.A. 8, 1929), 32 F. 2d 127. The Government has argued against the standard established by this Court's decisions in *Mesarosh* and *Griffin*, but has suggested none to replace it.

In short, by a labored process of confession and avoidance, the Government has corroborated the argument contained in our Petition that the legal criterion applicable to motions for new trials based upon newly discovered evidence is not clearly delineated. The Brief in Opposition supports our argument that this matter is clothed in confusion and calls for resolution by this Court.[3]

[3] The Government suggests that the criterion used by the courts below was urged by petitioner in their motions for a new trial, and that therefore they framed the issue in the terms which they now criticize (Br. in Opp., p. 16).

This is not true. In his motion for a new trial, petitioner was arguing that the absence of Schwimmer's testimony at the trial seriously prejudiced him; and *in that context* stated that had Schwimmer's testimony been available, petitioner "should have won an acquittal and been exonerated." (R. 7). This was not

II

The Brief in Opposition places considerable reliance upon this Court's decision in *United States* v. *Johnson*, 237 U.S. 106 (Br. in Opp., pp. 13-15, 19), in an attempt to circumscribe the role of this Court in the review of this case. The *Johnson* case, however, simply holds that orders granting or denying motions for a new trial, when review is sought on the ground that the trial court made erroneous findings of fact, should not be disturbed by reviewing courts where the findings are supported by any evidence. 327 U.S. at 111-12.

It is readily apparent that the *Johnson* rule is wholly inapplicable here. In the first place, *Johnson* does not preclude an appellate court from determining whether a trial court has applied the correct legal criterion in the determination of a motion for a new trial. This presents a question of law, and is and always has been properly subject to full appellate review.

Secondly, the *Johnson* decision is inapplicable to the determination of the issues presented in this case because *Johnson* was predicated on the concept that the judge who presides at a trial is in a superior position to pass upon motions for a new trial based upon newly discovered evidence: that the trial judge "had conducted the original trial and had watched the case * * *

"framing the issue", but rather describing the importance of Schwimmer's testimony.

On the other hand, the Government urged the *Johnson* formula from the outset (Brief for the United States in the District Court in Opposition to the Motion for New Trial of Defendant Connelly, pp. 24, 26-27, 35; and continued to press it in the Court of Appeals (Brief of the United States in the Court of Appeals, pp. 49, 53-54, 66).

unfold from day to day" and was "exceptionally qualified" (327 U.S. at 112) since he was able to draw upon "his own knowledge of the original six-weeks trial." (327 U.S. at 109). Here, of course, Judge Nordbye, as Successor Judge, had *not* seen the case "unfold from day to day" and was therefore *not* "exceptionally qualified" since he could *not* draw upon "his own knowledge of the original six-weeks trial."[4] His review was based on nothing more than a reading of the cold record, and his determination of the present motion does not call for the special deference to which this Court alluded in *Johnson*.[5]

III

A. Much is made of the fact that in the prior stages of this litigation petitioners have described Schwimmer in uncomplimentary terms (Br. in Opp., p. 22, par-

[4] The suggestion that this issue was "extensively litigated on the first appeal" and that this is an attempt to "revive the same arguments in the present proceeding" (Br. in Opp., p. 15) merits only brief reply. The first appeal had to do with the propriety of Judge Nordbye's rulings on certain pre-verdict and post-verdict motions, none of which had to do with Schwimmer's testimony which was then not available. In consequence, the most that could have been decided in the prior proceeding was that it was appropriate for Judge Nordbye, as Successor Judge, to decide the motions in the prior proceeding.

[5] The statement at p. 15 of the Brief in Opposition that "the substitution of judges was of diminished importance" because the prosecution's evidence "was virtually all documentary" is not correct.

Sixty-six witnesses testified in person, mostly on behalf of the Government. Furthermore, the defendants were themselves on the stand for five days of the thirty-eight day trial. Judge Hulen, the trial judge, stated that intent is the "gist of this case" (Tr. 2893) and Judge Nordbye himself acknowledged that the "crucial question" in the case was one of "intent" (Appendix to original Petition for Certiorari, p. 62a).

ticularly n. 7). The gist of these characterizations was that Schwimmer was the arch conspirator and the sole author of the whole nefarious scheme. Petitioner does not now retract any of this obloquy; he reiterates it.

Schwimmer's activities and the central position he occupied in the conspiracy which is the subject of this prosecution are the very reasons why his testimony is so essential to any fair trial of petitioner. Only he can dispel the inferences and innuendoes upon which the flimsy chain of circumstantial evidence was based.

That Schwimmer may be a man of "low moral character" does not make his testimony any the less important. "[O]ur law has never undertaken to set any quantative standards of verity; we have unconditionally left it to the jury to determine how persuasive the testimony of any witness will be." *United States* v. *Reina* (C.A. 2, 1957), 242 F. 2d 302, 307. "As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." *Allison* v. *United States*, 160 U.S. 203, 210.

B. For like reasons, the references by the courts below and the Brief in Opposition to Schwimmer as "an admitted perjurer" (App. 90, 97; Br. in Opp. p. 22) are unjustified. The courts below and the Government fail to distinguish between a *conviction* for perjury and an *indictment* for perjury. *Cf.*, *Allison* v. *United States*, *supra* at 210. But more important, this condemnation of Schwimmer results in a fundamental inconsistency since it goes in opposite directions at the same time. The Government has already indicted

Schwimmer for perjury, claiming that his testimony before the grand jury relating to Exhibit 100-J was false (Br. in Opp., pp. 6-7, particularly n. 3). Now it argues from an entirely opposite pole: that the testimony of Schwimmer *in this proceeding* is unreliable because it is inconsistent with Schwimmer's testimony before the grand jury (Br. in Opp., p. 22). For the purpose of justifying the indictment of Schwimmer, the Government claimed that his grand jury testimony was false; for purposes of this proceeding, the Government contends that it was true. The Government cannot have its cake and eat it too!

That Schwimmer's present testimony may be inconsistent with his grand jury testimony does not necessarily require the conclusion that his present testimony is true. However, the fact that his present testimony may have substantiated, rather than disproved, the charge of perjury pending against him—thereby constituting an admission against his interest—lends considerable credence to his present testimony.

It is no more appropriate for us to judge Schwimmer's present capacity for truthfulness than it was for the courts below. It is in order to observe, however, that during the period of his critical illness, when he was at the very threshold of death, and when he had lost the power to speak, to read, and to write, he had ample opportunity for self communion; and it is not inappropriate to suggest that he may now have acquired a greater respect for truth and integrity. Certainly, there is enough here to require that a jury be given an opportunity to make its own judgment as to his credibility.

IV

Finally, we respectfully call to this Court's attention the lack of any response of any kind to Point III in our Petition. It was there pointed out that the decisions of the courts below in the prior proceedings in this case were predicated upon the assumption that Schwimmer's testimony would be either unavailable or unfavorable; that this assumption has now been unequivocally disproved; and that, under the circumstances, due process of law and the interest of justice require that a new trial now be granted.

We suggest that there has been no response to this Point III because there is no other conclusion which can properly be drawn.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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